The Netherlands

XIII. The Netherlands

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A. Introduction

In our contribution to the previous Yearbook, discussing the evolutions in Dutch tort law in 2001, we already made clear that evolutions in the domain of liability and tort law in the Netherlands move pretty fast[1]. The same is the case once more for the evolutions in 2002[2]. Several events that occurred in 2001 still had their influence in Dutch liability law in 2002. In this respect, we can once more refer to the spectacular fire in Volendam on New Year's Eve 2000–2001 and the explosion of the firework factory in Enschede in May 2001. Also in 2002, these still led to discussions at the political level and in the literature on the role of tort law in compensating victims of those tragedies. 1

An issue which still is high on the agenda today in the Netherlands is the question what the goal of liability law in the future should be. The question which is asked, especially in the aftermath of 11 September 2001, is whether the increasing scope and scale of catastrophes should lead to a fundamental rethinking of tort law. That question is particularly asked with respect to so-called new risks, more particularly new health risks, like electro-magnetic fields, new occupational diseases etc. The case law of the *Hoge Raad* imposes increasingly stringent obligations on those responsible to prevent those risks[3]. Questions are also asked concerning the insurability of the liability for these new risks[4]. 2

In the previous contribution we already sketched some interesting evolutions in the case law of the *Hoge Raad* concerning liability law. We will now mostly indicate in what way this case law has evolved without repeating the previous 3

[1] See M. Faure/T. Hartlief, The Netherlands in: H. Koziol/B.C. Steininger (eds.), *European Tort Law 2001* (2002), 353.

[2] Therefore it will not be possible to discuss all the developments within this contribution. For an overview of evolutions in liability law in 2002 in the Netherlands see T. Hartlief, [2002] *Nederlands Tijdschrift voor Burgerlijk Recht* (NTBR), 460–478.

[3] For an overview see W.H. van Boom, [2001] *Aansprakelijkheid, verzekering en schade* (AV&S), 3.

[4] M. Faure/T. Hartlief, *Nieuwe risico's en vragen van aansprakelijkheid en verzekering* (2002).

case law. Therefore, we have made a selection, focusing on the most important evolutions in case law. Case law concerning liability law in the Netherlands is too extensive to allow an exhaustive discussion within the scope of this contribution.

B. Legislation and Evolutions at Policy Level

1. Introduction

4 In 2001, the Dutch Minister of Justice announced that a fundamental rethinking of liability law was to be considered[5]. Therefore, one understands that legislative changes in 2002 were relatively scarce. This is also partially due to the fact that 2002 was a rather remarkable year at the political level in the Netherlands. After the sudden rise in the legislative pools of the new phenomenon Pim Fortuyn and his killing on 6 May 2002, this subsequently led to a revolution in the political landscape with the legislative elections of 15 May 2002. The Lijst Pim Fortuyn became one of the parties in the government but, without any political experience, this government already collapsed in the autumn of 2002 and new elections took place on 22 January 2003. Moreover, before the legislative elections of 15 May 2002, the previous government headed by the socialist Prime Minister Wim Kok had also collapsed because of the Srebrenica case (concerning the role of the Dutch battalion of the United Nations military presence in former Yugoslavia). As a result of these many political crises, there was effectively no time for serious legislative work during most of 2002. That explains why there is very little to report concerning new legislation. However, there are various government and policy committees which formulated interesting viewpoints which are worth mentioning. These can indeed provide an indication for future developments at the legislative level.

2. Liability for Mining Damage

5 The only real issue worth mentioning as far as new legislation is concerned relates to the liability for damage caused by changes in the level of the soil as a result of mining. This liability is provided for in art. 6:177 of the Dutch Civil Code. As a result of the legislative change, the newly formulated first alinea of this article now provides that the licensee of a mine will also be held liable for damage caused by changes in the level of the soil as a result of the construction or exploitation of the mine.

3. Financial Guarantees

6 One issue which received attention at the political level is the risk that tortfeasors may escape liability because of insolvency. The insolvency risk of course raises the question whether, at the legislative level, duties to provide sufficient

[5] For a discussion see M. Faure/T. Hartlief (supra fn. 1), 352–353.

financial coverage (or even compulsory insurance) should be introduced. The previous government clearly indicated a wish to contemplate the introduction of a duty to provide financial coverage for risky enterprises[6]. On 19 November 2001[7], the previous Minister of Justice Korthals specifically addressed this issue in a lecture he gave[8]. One issue which the Minister discusses is the possibility of erecting a collective compensation fund which would be used to cover damage caused by large scale losses. The Minister indicates that a disadvantage of such a collective funding mechanism is that ultimately all citizens will have to contribute to this fund via the tax mechanism. Thus a new form of collectivisation would be added to the already existing schemes. In addition, the Minister also indicates that there may be a serious moral hazard problem if the government intervened to finance those losses: it may dilute the incentives of the tortfeasors to prevent the losses. Meanwhile a proposal has been formulated to force certain large enterprises to provide financial guarantees within the scope of the Environmental Management Act. This guarantee should thus cover future environmental losses[9].

4. New Risks

As we already indicated in the introduction, the financial consequences of losses caused by new risks and the possible role of tort law in that respect are high on the political agenda. The Dutch government asked opinions on this issue from the council for the national health (*Raad voor de Volksgezondheid en Zorg*, RVZ)[10] and from the social economic council (*Sociaal Economische Raad*, SER)[11]. These advisory bodies also notice that the difficulties with these new risks are precisely the fact that it usually concerns unforeseeable risks. Hence this makes it rather difficult to anticipate those risks with legislative measures[12]. An important issue in this respect concerns the question whether the losses caused by new risks should indeed be subjected to liability law or preferably to other solutions, like direct insurance. The latter seemed to be the tendency in a report drafted by Donner concerning the problems of unemployment caused through disability[13]. However, these proposals have so far not reached the level of political decision making.

7

[6] See Second Chamber of Representatives (2001–2002), 28000 VI, no. 6, 4.

[7] We could not discuss this in our previous contribution discussing tort law in 2001, but it is definitely worth mentioning now.

[8] See also First Chamber of Representatives (2001–2002), 26824, no. 128, 3.

[9] See in this respect a critical discussion of this proposal by J. Van den Broek, [2002] *Milieu en Recht* (M&R), 161.

[10] See RVZ, *Gezondheidsrisico's voorzien, voorkomen en verzekeren* (2001).

[11] See SER, *Nieuwe risico's,* Publication 02/06 (2002).

[12] See in this respect also M. Faure/T. Hartlief (supra fn. 4).

[13] This was discussed in our previous contribution. See M. Faure/T. Hartlief (supra fn. 1), 354–355.

5. Statute of Limitations

8 In the previous yearbook we indicated that the government had introduced a proposal concerning the statute of limitations for personal injury[14]. That proposal again did not move forward in 2002. The Bill is currently being debated at the First Chamber of Representatives, where critical questions are being asked concerning the insurability of the new victim-friendly regime (a claim would only expire five years after the day on which the victim is acquainted both with the damage as well as with the identity of the liable injurer) and concerning the scope of application in time[15]. As we mentioned, the victims of today will in principle not benefit from the Bill. The new rules will only apply to new cases, but precisely in this respect may the Bill be amended.

6. Liability of the Internet Provider

9 From the legislative and policy level, the final issue worth mentioning is a proposal to introduce a liability of the internet provider in art. 6:196b of the Dutch Civil Code. This constitutes a part of the adaptation of the Dutch Civil Code as a result of the implementation of the directive concerning e-commerce[16].

C. Case Law

1. Liability for Non-Subordinates

10 In the previous contribution we discussed case law of the *Hoge Raad* concerning the scope of art. 6:171 of the Civil Code. This article holds that a superior can be held liable for the torts committed by a third party even if that third party is not formally a subordinate of the superior. In a case of 15 May 2001, which we discussed before[17], the *Hoge Raad* limited this scope of liability to cases where there is "unity of enterprise" between the acts of the superior and those of the third party. A second case of 21 December 2001 also deals with the scope of this art. 6:171 of the Civil Code[18]. The case deals with the following facts. A construction company, Hamaker, built a few villas and used Hendriks BV for the work on the roofs. One of the employees of Hendriks, Janssen, drops a piece of a utensil which hits an innocent passer-by, Karelse. According to Dutch law, this victim Karelse could bring a claim against the tortfeasor Janssen on the basis of the general tort rule of art. 6:162, against his employer Hendriks on the basis of art. 6:170 and also against Hamaker precisely on the basis of this art. 6:171 of the Civil Code. Important in this respect was that Hendriks was exercising work for the Hamaker enterprise. The

[14] For the contents of that proposal see M. Faure/T. Hartlief (supra fn. 1), 358.
[15] See for comments concerning this Bill among others C.J.H. Brunner, [2001] *Rechtsgeleerd Magazijn Themis* (RM Themis), 243; Broekman, [2001] *Advocatenblad*, 652 and R.P.J.L. Tjittes, [2002] *Weekblad voor Privaatrecht, Notariaat en Registratie* (WPNR), 6472, 53.
[16] Official Journal L. 178.
[17] M. Faure/T. Hartlief (supra fn. 1), 360.
[18] *Hoge Raad* 21 December 2001, [2002] *Nederlandse Jurisprudentie* (NJ), 75.

fact that Hendriks does so within its own company is irrelevant. However, one can question what potentially the scope of this provision on the basis of that case law could be. This is further extensively dealt with in the literature[19].

2. Liability for Goods

11 As we mentioned before, the Dutch Civil Code holds specific provisions concerning the liability for damage caused by specific movables, animals, dangerous substances and defective products. Interesting in that respect is art. 6:174 which provides for a strict liability for damage caused through defective goods[20]. The case law in 2002 dealt especially with the liability of the authorities responsible for roads. In earlier case law, the *Hoge Raad* had already formulated a strict duty of care aiming at the safety of all road users. In addition, the *Hoge Raad* had also formulated strict duties to warn for specific dangers[21]. Against this background of severity a recent decision of the *Hoge Raad* of 3 May 2002 is quite remarkable[22]. The case dealt with an accident that occurred on New Year's day of 1996. A car driver slipped and collided with the crash barrier. At that moment there was black ice. On the specific part of the road a type of asphalt had been used, referred to as ZOAB. It had specific known advantages, but more particularly in case of frost, also specific disadvantages. In that case, it is more slippery than other types of asphalt and moreover measures taken against frost (like salt) are less effective. The civil court judged that the use of the so-called ZOAB asphalt did not make the road as such defective in the sense of art. 6:174. The reason was that this ZOAB did not create a specific danger compared to the generally known fact that ice may always cause danger and lead to specific duties of care for the road manager. This of course means that measures can be required from the road manager, but salt had been applied and the media had given attention to the particularly bad weather conditions. Therefore, the civil court held that the road manager had done what was required. This decision was upheld by the *Hoge Raad*.

3. Liability of Public Authorities

a) Introduction

12 This area of liability law gives rise to so many evolutions in case law and legal doctrine that it apparently necessitated the start of a new journal: *Overheid en Aansprakelijkheid* (Authority and Liability). The editorial board provides in the first issue an overview of the current state of affairs, more particularly in case law[23]. Hennekens also provided in his farewell address an overview of

[19] See for further details T. Hartlief, [2002] *Ars Aequi* (AA), 886–896.

[20] See M. Faure/T. Hartlief (supra fn. 1), 360–361.

[21] See in this respect *Hoge Raad* 20 March 1992, [1993] NJ, 547, with case note by CJHB and *Hoge Raad* 6 September 1996, [1998] NJ, 415 with case note by CJHB.

[22] *Hoge Raad* 3 May 2002, [2002] NJ, 456, [2002] NTBR, 347, P. Meiser and see more particularly the informative conclusion by Advocate General Spier.

[23] See J.E.M. Polak and others, *Overheid en Aansprakelijkheid* (2002), 2. See also I. Bij de Vaate and others (eds.), *Facetten van overheidsaansprakelijkheid* (2002).

case law with respect to the liability of public authorities[24]. Hennekens is quite critical of the case law of the *Hoge Raad* in this respect and holds that the case law in this area is largely inconsistent. Many other authors have discussed the case law in this area. Particularly interesting are a book by Barendrecht and others discussing the liability of public authorities for information provision[25] and the opinions written for the Association of Administrative Law (*Vereniging voor Administratief Recht*) of 2002, dealing with the compensation in case of damage caused by case law[26]. From the widely available case law in this domain we will select one case dealing with damage caused by "unlawful case law"[27].

b) Unlawful Case Law

13 In May of 2002 the *Hoge Raad* had to decide on tort claims against the state concerning unlawful decisions of the administrative appellate board for enterprises, *College van Beroep voor het Bedrijfsleven* (CBB). It is an appellate administrative body which cannot be considered as an "independent tribunal" in the sense of the ECRM[28]. In two cases, the claim was dismissed because the statute of limitations had been reached[29]. What were these cases about? At the moment of the decision of the CBB (in 1987 and 1989), the victims were already aware of their damage and knew who the injurer was (the state). Hence, the statute of limitations started to run and the claim expired at the beginning of the 1990s after a five year period. The state had been arguing, supported by (a part of the) legal doctrine, that the CBB was indeed an independent tribunal in the sense of the ECRM. Hence it could have been argued that it was due to the state that the victims did not file their claim earlier. However, this apparently does not help the claimants in the particular cases. What is strongly held against them is that, after the decision of the CBB, the claimants did not file a claim with the civil court or take other measures to prevent the statute of limitations from expiring during the time that they were awaiting a decision of the ECRM.

14 Before the *Hoge Raad*, it was also argued that the state would not be able to call on the statute of limitations; this would be unreasonable and unjust taking into consideration the attitude of the state with respect to the CBB and considering the fact that only in 1994 was it established that the CBB was not "an independent tribunal" in the sense of the ECRM. However, this argument failed. However, the *Hoge Raad* is not completely insensitive to this argument since it argues that one could at least have expected from the claimants[30] that the

[24] H.Ph.J.A.M. Hennekens, *Overheidsaansprakelijkheid op de weegschaal,* Farewell address Katholieke Universiteit Nijmegen (2001).
[25] See M. Barendrecht, e.a., *Overheidsaansprakelijkheid voor informatieverstrekking* (2002).
[26] See *Schadevergoeding bij rechtmatige overheidsdaad* (2002), with opinions by J.E. Heutink, G.E. Van Maanen, B.P.M. Van Ravels and B.J. Schueler.
[27] In the previous overview we discussed case law of the *Hoge Raad* dealing with damage caused by police actions (see M. Faure/T. Hartlief (supra fn. 1), 364).
[28] European Court on Human Rights 19 April 1994, [1995] NJ, 462.
[29] *Hoge Raad* 24 May 2002, [2002] *Rechtspraak van de Week* (RvdW), 84 and 85.
[30] This follows also from *Hoge Raad* 28 April 2000, [2000] NJ, 430 and 431.

victims would at least file a claim against the state within reasonable time after the decision. The *Hoge Raad* notices that the decision of the European Court was published in the NJCM-bulletin (a leading human rights law journal in the Netherlands) in June 1994, whereas the claims were only filed on 6 July 1995 and 22 December 1995, which is apparently considered late. Less clear is, however, what this reasonable period to file the claim would be: six months, one year? It is at least pretty clear that the *Hoge Raad* follows a hard line in this respect. It is possibly a fear of an expanding liability of public authorities that may have led to this cautious approach of the *Hoge Raad*[31]. *The Hoge Raad* decision does not seem totally unreasonable in the light of the fact that claimants could have taken steps to stop the statute of limitations[32]. A consequence of the decision of the *Hoge Raad* can be that the failure to file a timely claim may lead to professional liability of the attorneys involved. Thus the damage will ultimately fall on someone who is pretty remote from the original tort.

4. Employer's Liability

a) Introduction

Already in our previous overview we indicated that the case law in the Netherlands tends towards a very strict employer's liability, whereby one can really wonder whether there is still any escape from liability for the employer[33]. Questions especially arise concerning the possibility of applying employer's liability on occupational diseases, like the repetitive strain injury (RSI)[34]. One of the issues which is highly debated today is whether pure psychological damage can also lead to a protection under the rule of employer's liability of art. 7:658 of the Dutch Civil Code. Some issues concerning the case law on employer's liability were already discussed in the previous overview. We will now merely address some aspects of the new case law for 2002. 15

b) Employer's Liability for Seamen?

In the previous overview we already discussed that for employees art. 7:658 of the Dutch Civil Code grants them a rather far-reaching protection since the threshold for liability, more specifically in case of occupational diseases, is indeed pretty low. In 2002 case law also focused on the question of the scope of protection of seamen in case of accidents and occupational diseases. Differently than their colleagues "on the shore", seamen cannot enjoy the broad protection granted through art. 7:658 of the Dutch Civil Code. The application of 16

[31] In this respect one can also point at the fact that also the Dutch highest administrative court, the council of state (*Raad van State*) was equally attacked from an ECRM perspective.

[32] This was also suggested in the conclusions of Advocate General Spier.

[33] For details see M. Faure/T. Hartlief (supra fn. 1), 365–369. See also M. Faure/T. Hartlief (eds.), *Schade door arbeidsongevallen en nieuwe beroepsziekten* (2001).

[34] See in this respect for a discussion of case law R. van de Water, [2002] *Rechtshulp*, 17, T. Hartlief, [2002] NTBR, 4 and B. Sorgdrager, [2002] *Tijdschrift voor Vergoeding Personenschade* (TVP), 14.

this article on employer's liability has been explicitly excluded in the Code of Commerce (art. 391 and 450b of the Dutch Code of Commerce). The justification of the different regime for seamen is not very clear and if there was one, it seems that this justification has anyway disappeared today. Therefore, one should not be surprised that lower case law "simply" applies the employer's liability regime of art. 7:658 of the Civil Code to claims based on either art. 6:162 of the Dutch Civil Code (the general rule of tort law) or art. 7:611 of the Civil Code (the duty of the employer to behave as a careful employer)[35]. These limitations also form the background for a decision of the *Hoge Raad* of 12 April 2002 in which a captain and a second engineer were involved[36]. A dredger, called Johanna Hendrika, moored in Le Havre whereby captain Heyboer incurred personal injury as a result of unlawful behaviour of the second engineer Stolk. Heyboer had been hired to do the job by a company called De Branding and therefore files a claim based on art. 6:170 of the Dutch Civil Code against De Branding. The Court of Appeals dismissed the claim of captain Heyboer on the grounds of contributory negligence. The case is brought to the *Hoge Raad* and there the question arises whether the claim could not only have been dismissed in case of intent or gross negligence of captain Heyboer (which would have been the case if the normal employer's liability rule of art. 7:658 of the Civil Code had applied). The specific aspect of this case is obviously that the victim, captain Heyboer, does not file a claim against his "employer" on the basis of art. 7:658 of the Civil Code[37] since that article does not apply and that he, moreover, does not file the claim against the one who is formally his employer, but against the one to whom he had been hired by his formal employer, being De Branding. The latter aspect is not a serious problem since the *Hoge Raad* has regularly decided that the rules of art. 7:658 of the Civil Code are also applicable to the "material employer". The result is, also in the light of the case law of the *Hoge Raad* concerning contributory negligence, not surprising: the *Hoge Raad* accepts that also if the claim is not formally based on art. 7:658 and also if the claim is addressed against a "material employer" who only hired the employee to perform specific work, contributory negligence can only be accepted in case of intent or gross negligence. The *Hoge Raad* grounds this decision on the framework of the code with respect to the relationship between employer and employee in case of damage suffered by the employee or caused by the latter to a third party. Therefore, it can be expected that also the legislator might follow this new approach and would therefore change the (rather outdated) rules of the Code of Commerce to adapt it to the needs of today.

[35] See Civil Court of Amsterdam 6 December 2000, [2002] *Verkeersrecht* (VR), 16, Civil Court of Rotterdam 20 December 2001, [2002] NJ, 136, Rechtbank Groningen 30 May 2002, [2002] JAR, 141, Civil Court of Rotterdam 4 June 2002, [2002] *Jurisprudentie Arbeidsrecht* (JAR), 183.

[36] *Hoge Raad* 12 April 2002, [2002] RvdW, 70 and see also [2002] NTBR, 345 with case note by E. Engelhard.

[37] Formally it was based on the old art. 1638x of the previous Civil Code.

c) Employer's Liability for Traffic Accidents?

17 In the previous overview, we extensively discussed the case law of the *Hoge Raad* concerning the question whether an employer could be held liable for traffic accidents caused by his employee. From this case law it followed that the employer is apparently to a large extent liable for traffic accidents caused by his employees, although the precise scope of the liability was still debated[38]. One of the questions that arose is what rule will be applicable if the traffic accident by the employee does not occur in the execution of his work but when the employee drives to his work. That issue has now been addressed with regard to the following case: a construction worker drove in his car from his work to the place where he actually had to work, being where the construction work took place. He was joined by a few colleagues in his car. As a result of negligence of this driver, the car gets involved in a serious accident. The car is damaged and in addition there is personal injury for the driver and to all the passengers. The damage of the passengers (obviously not of the driver) will be compensated by the liability insurer of the car. That hence poses no specific legal problem. The question that arose in this case was whether the driver (whose damage was not covered by liability insurance) could address the employer in liability. After an initial judgment of the Civil Court of Breda whereby this claim was denied[39], the *Hoge Raad* rendered a decision which seems to provide interesting perspectives for victims in this case. The Civil Court of Breda decided that the accident had taken place outside of the formal working hours. In that case, art. 7:658 of the Civil Code is not applicable. However, the court argued that since this case concerns an accident which occurred in a private situation, but which is clearly connected to the work, possibly art. 7:611 of the Dutch Civil Code could be applied. This article, as was mentioned above, provides that the employer is bound to behave as a good and careful employer. There was, moreover, a precedent in this respect[40]. The Civil Court of Breda judged, however, that there was no specific circumstance as required by the *Hoge Raad* in the mentioned precedent. This would mean that one could not argue that there would be employer's liability for accidents on the way to or from work based on equity and justice. The problem with that point of view is of course that case law does accept employer's liability when the employee drives in the course of his work. It is not always clear in which case the employee is merely driving from home to his work (or the other way around) or whether the accident takes place when the employee is formally driving in the course of his work. One can think of the hypothesis that the employee would drive from home to his work and do something for his employer (like delivering a package on the way). The distinction between accidents in the course of the employee's work on the one hand and home – work accidents therefore does not seem crystal clear. Meanwhile the *Hoge Raad* has annulled the decision of the Civil Court of Breda. The *Hoge Raad* held that the driver was a specifically designed driver in the sense of the applicable provisions of

[38] See the discussion in M. Faure/T. Hartlief (supra fn. 1), 367, 369.
[39] Civil Court of Breda 16 May 2000, [2000] TVP, 109 (with case note by Bos-Van den Berg).
[40] *Hoge Raad*, 22 January 1999, [1999] NJ, 534 with case note by P.A. Stein.

the collective labour agreement. Therefore this was not an ordinary home – work accident, but a type of transport that can be considered as transport in the execution of a labour contract[41]. Of course the *Hoge Raad* decision has not answered all questions. It will still have to be investigated whether for instance the employee received a reimbursement of expenses which also was meant for him to purchase (first party) insurance coverage. Moreover, in this particular case the specific employee was apparently "saved" by the *Hoge Raad* since he could call on a specific provision of the collective labour agreement. Still the question therefore arises what happens in case of "ordinary" home – work accidents whereby the employee cannot call on a specific provision of a collective labour agreement. Hence, one can expect more evolutions in case law in this respect.

d) Relationship Between Art. 7:611 and 7:658 of the Dutch Civil Code

18 We already referred a few times to the fact that employees base their claims in liability against employers not only on art. 7:658 (the specific rule concerning employer's liability) but sometimes also on art. 7:611 of the Dutch Civil Code (a general provision holding a general duty of care for the employer). Both in legal doctrine and in case law the question has been addressed what the specific relationship is of the two provisions. In legal doctrine it has been held by some that art. 7:658 should be considered a *lex specialis* and art. 7:611 a *lex generalis*. A consequence of this would be that when a situation is covered by art. 7:658, but does not lead to liability of the employer, it would not be possible to call subsidiarily on the more general rule of art. 7:611[42]. The foundations of both articles seem to be different. Nevertheless one can see a tendency towards an increasing use of art. 7:611 of the Civil Code whereby some even ask the question whether this will lead to the end of art. 7:658. In the previous overview we already indicated that the threshold for employer's liability under art. 7:658 has become extremely low and that it sometimes seems as if there is no escape at all from employer's liability under this article[43]. A traditional distinction between both articles was that for art. 7:658 it was still necessary that there was a violation of a specific duty of care by the employer, whereas the foundation for the liability under art. 7:611 was traditionally different. However, now that case law seems to accept liability under art. 7:658 also in cases where a violation of a specific duty of care by the employer is less obvious, the border-line with art. 7:611 becomes less clear. One can now indeed already notice in case law that judges tend to accept employer's liability under art. 7:611 if the (in theory stringent) conditions of the employer's liability under art. 7:658 are not fulfilled. An example can be found in a case dealt with by the Kantonrechter of Beetsterzwaag[44]. A nurse working with mentally disabled adolescents had suffered damage after being hit against her knee by a

[41] See *Hoge Raad* 9 August 2002, [2002] RvdW, 130.
[42] This has been held by T. Hartlief, [2002] RM Themis, 67.
[43] See M. Faure/T. Hartlief (supra fn. 1), 365–366.
[44] Kantonrechter Beetsterzwaag 12 June 2001, [2001] JAR, 145, [2002] TVP, 117, with case note by C. Hemrica.

seventeen year old girl. She filed a claim in employer's liability under art. 7:658, but it was clear that the employer had not violated any duty of care, so that this provision did not apply. Nevertheless liability of the employer under art. 7:611 was accepted. Although this approach seems to collide with the case law of the *Hoge Raad*[45] it is, in the light of the developments we sketched above, an understandable decision.

5. Causal Uncertainty

19 In the previous overview we already pointed at the case law of the *Hoge Raad* holding that in specific cases, where a violation of a specific norm is established, there is a presumption of causation. In the previous overview we discussed the case law of the *Hoge Raad* in this respect, which is in legal doctrine referred to as the "reversal rule" (*omkeringsregel*), referring to the reversal of the burden of proving causal uncertainty[46]. However, a *Hoge Raad* case of 23 November 2001 which dealt with the violation of an information duty by a physician also showed the limits of this "reversal rule" by arguing that there is no causal relationship between the violation of an information duty and the subsequent negligence during surgery or treatment. After our brief discussion of this case in the previous overview, some comments have been published on this decision[47]. Specifically interesting is the rather critical case note by former advocate-general Jan Vranken[48]. He argues that the *Hoge Raad* apparently holds that this reversal rule should not apply in case of a violation of information duties in case of risky transactions or treatment. This is a point of view which is debated in the literature (and seems to depart from previous case law of the *Hoge Raad*). Giesen for instance holds that the reversal of the burden of proving causation would exactly be quite important with a view to enforcing informational duties of physicians[49].

20 Moreover, by the end of 2002 the *Hoge Raad* decided a few other rather important cases concerning this "reversal rule".[50] One of the two cases dealt with the following rather simple facts: farmer Kastelijn has a chicken farm in Zwijsel and wishes to proceed to pig farming. However, the necessary environmental permit for this activity is denied by the community Achtkarspel. The farmer appeals and later receives the permit. Meanwhile, however, the regulation concerning manure has been changed and, as a result, Kastelijn no longer has the possibility to start pig farming. Farmer Kastelijn therefore holds the local community liable and argues that he suffers damage as a result of the wrongful refusal of the permit by the community. The community argues as a defence that there is no causal relationship between its tort (refusing the per-

[45] More particularly *Hoge Raad* 17 November 1989, [1990] NJ, 572, with case note by P.A. Stein (De Kok/Jansen's, Schoonmaakbedrijven).

[46] See M. Faure/T. Hartlief (supra fn. 1), 371–373.

[47] Among others by D. Kaandorp, [2002] TVP, 18–24 and by S. Slabbers, [2002] *Tijdschrift voor Gezondheidsrecht* (TvG), 181.

[48] See [2002] NJ, 386 and 387.

[49] See I. Giesen, [2001] AV&S, 152.

[50] *Hoge Raad* 29 November 2002, [2002] RvdW, 190 and 191.

mit) and the damage the farmer would have suffered. The community argues that even if the permit had not been refused, the farmer would probably not have received the necessary financing among others to build the stalls for his pigs. Kastelijn however argues that Friesland Bank would have granted him an investment of NLG 250,000 (€ 113,445). Farmer Kastelijn loses in the first instance. And the same is the case in appeal. Farmer Kastelijn goes to the *Hoge Raad* and holds precisely that the lower courts had misinterpreted the reversal rule as established in the case law of the *Hoge Raad*. The *Hoge Raad* repeats again what the contents of this case law are and then argues that in this specific case there is no reason to apply it. The *Hoge Raad* holds that the tort of the community consisted in the refusal of the community to grant farmer Kastelijn his licence. This only creates the possibility that Kastelijn, as a result of this refusal, suffered damage. The Court of Appeals could therefore rightly hold that a causal link between the wrongful refusal and not building the pig stalls is not established. The burden of proving that farmer Kastelijn would, if the permit had not been refused, have received financing enabling him to construct the pig stalls was therefore, according to the *Hoge Raad*, rightly laid on the shoulders of the farmer. However, it is clear that although the *Hoge Raad* literally holds that these cases were issued to provide more clear guidance on the contents of this reversal rule, in practice a lot of questions remain unanswered. It is, however, clear on the basis of this recent case that the *Hoge Raad* apparently wishes to limit the applicability of this so-called reversal rule.

6. Liability for Unknown Risk

21 As we mentioned above, one of the highly debated issues in tort law is how tort law should react to new health risks. A well-known case in the Netherlands dealt with an epidemic of so-called legionella (also referred to as veteran disease) which occurred in March 1999 after contamination had taken place at a garden exhibition which was held from 19 until 28 February 1999 in Bovenkarspel. The legionella bacteria killed 28 victims in that particular case. Apparently the legionella bacteria can, under specific circumstances, cause the so-called veteran disease. This can lead to pneumonia and more particularly weaker people can suffer severe consequences as a result of the contamination. The likelihood of an exposure to legionella bacteria is the highest in case of an exposure to water with a temperature between 25 and 55 degrees Celsius. The contamination takes place when contaminated water is emitted in the form of very small water particles which are subsequently inhaled by the victims. Known sources of contamination are all water circuits with a temperature under 50° C, such as fountains, whirlpools, bathing areas and air conditioning.

22 A procedure was initiated against an enterprise, Jan Jong Holding BV, who had exposed a whirlpool at the time of the Flora which had bubbling water all the time at approximately 37.5° C. The Court of Appeals of Amsterdam[51] held

[51] Court of Amsterdam 4 January 2001, [2001] *Kort Geding* (KG), 40.

that from a reasonable and careful dealer in whirlpools it can be expected that he should be aware of the normal dangers connected to the use of whirlpools and that he should be aware of the preventive measures that should be taken. The Court held that the dealer knew or should have known that in the water of a whirlpool a growth of the number of bacteria could take place and that therefore devices should be applied which could have stopped this process. The Court therefore holds that the dealer did not take sufficient safety measures to reduce the risk and is therefore held liable on the basis of the general article in tort law 6:162 of the Dutch Civil Code.

Interestingly enough the Court clearly stresses that the risk caused by bacteria 23
in whirlpools was not unknown or unforeseeable and that moreover, this risk could have been prevented by taking adequate (and not too expensive) measures. Interesting as well is the fact that the dealer defended himself by arguing that there was no causal link between his whirlpool and the damage suffered by the victims (there were possibly other sources of legionalla at the exibition as well). This defence is, however, rejected precisely because the so-called reversal rule, just discussed, is applied: the dealer has violated a safety norm and has therefore acted wrongfully against the victim. When the risk then materialises, the causal link between the violation of the norm and the damage is therefore in principle given unless the dealer could have proven that the damage would also have occurred without a violation of the safety norms[52]. The dealer was therefore held liable and a subsequent appeal to the *Hoge Raad* was rejected[53].

7. Compensation for Non-Pecuniary Losses

In the previous overview we discussed legislative attempts to provide better 24
compensation for non-pecuniary losses for victims in the Netherlands[54]. Given the political situation in the Netherlands in 2002, relatively little happened with this proposal[55], but this proposal received a lot of attention in legal doctrine. We will discuss some of these comments in the literature below. However, the compensation for specific non-pecuniary losses, more particularly emotional shock, received quite a bit of attention in 2002 as a result of a *Hoge Raad* case dealing with this issue. The facts giving rise to the case are extremely dramatic and painful: a five year old girl is hit by a cab whose driver had apparently not seen the little girl. After the girl fell the driver drove with his back wheels over the head of the little girl. The mother, who had meanwhile been warned, saw her daughter lying on the ground and thought her

[52] For a comment on this case and for possibly other legal foundations see B. Maat, [2000] VR, 353–358.

[53] See *Hoge Raad* 29 November 2002, [2002] RvdW, 192. For a discussion of this legionella case in Bovenkarspel see also M. Faure/T. Hartlief (supra fn. 4), 61–66.

[54] See M. Faure/T. Hartlief (supra fn. 1), 356–358.

[55] Although in February 2003 it is now in slightly modified form being introduced in Parliament (see documents of the Second Chamber of Representatives, 28781, for a summary see [2003] *Nederlands Juristenblad* (NJB), 401–403). We will report in more detail on this proposal in the 2003 overview.

daughter had vomitted and went inside to call the emergency services. She then went back and tried to turn the head of the little girl. At that moment she discovers that her hand disappears in the skull of the little girl. What the mother first thought to be sick thrown up by the little girl appeared to be a part of the contents of the skull. The mother holds that this dramatic experience caused her a post-traumatic stress disorder and claims compensation from the injurer for this emotional shock. The Court of Appeals makes a distinction between on the one hand the consequences of the death of the child which do not give rise to specific compensation and on the other hand the consequences of the shocking way in which the mother has been confronted with the terrible injury suffered by her daughter, which may give rise to compensation. The defendant argued that he had not acted wrongfully against the mother, since she was not present at the time the accident occurred. The Court of Appeals rejects this defence, arguing that the violation of the specific traffic norm is also unlawful against the mother, even though she was not herself put into danger as a result of this violation. The Court of Appeals awards an amount of NLG 30,000 (€ 13,613.40) in pain and suffering specifically for the emotional shock resulting from the mother's confrontation with the terrible consequences of the accident and the resulting psychological harm. The *Hoge Raad* dealt with this case on 20 February 2002[56]. The case and the *Hoge Raad* decision received a lot of attention both in the general media and in legal doctrine[57].

25 The *Hoge Raad* first provides, as it calls it, a few "general view points" and argues that it has to provide a decision within a framework provided by the legislator. In this respect it holds that, within the current applicable regime in the Netherlands, it is not possible to award non-pecuniary losses for so-called "affection damages" (being the emotional loss suffered by a third party for the loss of a loved one). The *Hoge Raad* holds that it cannot be the task of the judge to award damages for that type of loss in deviation of the statutory regime. Thus the *Hoge Raad* fails to answer a difficult question which obviously can be better answered by the legislator than by the judge. In this respect one can think of tricky questions like whether a right to compensation for "affection damages" should be limited to the case of the death of a loved one or can also apply in case of serious injury; who would be entitled to those damages (only the direct relatives or also others); for what amounts etc. Very cautiously the *Hoge Raad* suggests, however, that there is apparently a need in society to provide the survivors of the victims some compensation, which can be a rea-

[56] *Hoge Raad* 20 February 2002, [2002] NJ, 240 with case note by J.B.M. Vranken. The *Hoge Raad* decision has also been discussed by the attorneys of both parties involved in the case in *Tijdschrift voor Vergoeding Personenschade*. See H.J. den Hollander, [2002] TVP, 33–42 and A.J. Van, [2002] TVP, 43–44.

[57] See discussions of this case by inter alia Leerink and Holthuis, [2002] *Advocatenblad*, 292–295; J. van den Berg and S. Damminga, [2002] AA, 313; H.J. den Hollander, [2002] TVP, 33–42, A.J. Van, [2002] TVP, 33–44; R.J.P. Kottenhagen, [2002] NTBR, 182–191; G.E. van Maanen, [2002] NJB, 1102–1107; S.D. Lindenbergh, [2002] AV&S, 62–73 and C.C. van Dam, [2002] VR, 205–209.

son to reconsider the existing legal regime in this respect[58]. As far as the right of the mother to compensation for the damage suffered by the emotional shock is concerned, the *Hoge Raad* holds:

> "When someone through the violation of a specific norm causes a serious accident, he acts in such a case not only unlawfully against the one who dies or is injured as a result of this, but also against the one who, by observing the accident or through a direct confrontation with the serious consequences of it, experiences a heavy emotional shock which results in psychological damage. This will more specifically be the case when someone stands in a close affectionate relationship with the person who is injured or killed in an accident".

The *Hoge Raad* also discusses the defence of the injurer that the family member can only be awarded damages if he has been involved in the accident as well. That is not accepted by the *Hoge Raad*. It decides that it is sufficient that there is a direct link between the dangerous behaviour of the injurer on the one hand and the psychological loss suffered by the other as a result of the confrontation with the consequences of this behaviour on the other hand. This confrontation can also occur (briefly) after the event which gave rise to death or injury occurred. The *Hoge Raad* also discusses the relationship to the so-called "affection damages". The *Hoge Raad* repeats that indeed, given the applicable system in the Netherlands, a distinction will have to be made between on the one hand the damage which is the result of the fact that the mother lost her child for which under current Dutch law no damages can be awarded and on the other hand the loss suffered as a consequence of the tragic confrontation with the accident, for which damages can be awarded. 26

As a result of this the *Hoge Raad* upholds the decision of the Court of Appeals. It is, according to the literature, clear that in this particular case the *Hoge Raad* has done more than simply deciding this specific case; indeed, the *Hoge Raad* has also formulated a ruling concerning the question under which circumstances so-called shock and affection damages can be compensated. The *Hoge Raad* repeats that affection damages can as such not be compensated, but recognises (thereby following legal doctrine and lower case law) the possibility of compensation for damage suffered as a result of the emotional shock. The latter can, by the way, refer both to material and to immaterial losses. Of course the decision of the *Hoge Raad* is limited to a specific category of emotional shock, being the case in which the victim herself has not been put in danger, but has only been confronted with the consequences of a certain event. A claim for shock damages could also be formulated in the case where the victim herself had also been put into danger but remained unharmed or in cases where the "direct" victim has not been the victim of a traffic accident, but for instance by aggression or violence[59], medical malpractice or a 27

[58] As we mentioned before there is a proposal to introduce such a right to compensation for non-pecuniary losses now. See M. Faure/T. Hartlief (supra fn. 1), 356–358.

[59] See the case dealt with by the Court of Appeals of Arnhem 20 June 2000, [2001] VR, 124.

sport accident. As a consequence of that, one should realise that this *Hoge Raad* decision does not necessarily have consequences for these other cases, for instance as far as the question of the relationship to the "direct" victim is concerned. That question will have to be dealt with separately in every case. For cases similar to the one dealt with by the *Hoge Raad*, a consequence is of course that the scope of protection of the specific norms violated by the injurer has been substantially enlarged. According to some, this expansion can be questioned, since the norms now also protect those who have not been endangered by its violation[60]. This can potentially lead to problems. It is indeed *ex ante* difficult to say who will be the others who also enjoy protection from the norm. The *Hoge Raad* does not require the physical presence of the victim, but suggests at least a direct confrontation with the event or its consequences. Being a witness to or being confronted with shocking events can of course also take place through e.g. direct television emissions (think about viewing the disaster at the football stadium in Hillsborough)[61] or via a webcam. Although there can be a large physical distance between the event and the victim, the confrontation can still be direct and hence sufficient for compensation. Not sufficient seems to be the situation where the victim is only informed of the consequences of an accident whereby a loved one is involved[62]. In that particular case the victim is indeed not directly confronted with the (circumstances of) the accident. However, from the perspective of the scope of protection the differences between both situations are not that clear[63]. The *Hoge Raad* suggests that a close affectionate relationship seems important, but it does not seem to be a formal requirement[64]. Of course it will seldom be the case, but still one could imagine that totally unknown third parties like witnesses or ambulance drivers suffer an emotional shock as a result of the (consequences of) an accident, although there is no affectionate relationship whatsoever with the victim. There seems to be no reason to exclude *a fortiori* their claim[65]. Given the wide interpretation the *Hoge Raad* provided of the scope of protection of the norms (violated by the injurer), there seems to be no reason to limit *a fortiori* the persons who could be victims as a result of the consequences of such a violation. What is, on the other hand, clearly a requirement for the compensation of both pecuniary and non-pecuniary losses is that the victim has suffered (emotional or psychological) damage. For the first time the *Hoge Raad* links this notion of damage, thereby following legal doctrine which is heavily inspired by foreign examples, to a type of illness which is recognised in psychiatry. This shows that specifically when the victim stood in an affectionate relationship with the "direct" victim, there can be a cumulation between shock damage and affection damage. In that case the judge will hence

[60] So G.E. van Maanen, [2002] NJB, 1106 and S.D. Lindenbergh, [2002] AV&S, 67.
[61] So also P.M. Leerink and B. Holthuis, [2002] *Advocatenblad*, 295.
[62] See also the case note by J.B.M. Vranken, [2002] NJ, 240, no. 4 and S.D. Lindenbergh, [2002] AV&S, 69.
[63] See also the critical remarks in that respect from C.C. van Dam, [2002] VR, 207.
[64] See R.J.P. Kottenhagen, [2002] NTBR, 191 and S.D. Lindenbergh, [2002] AV&S, 69–70.
[65] Although J.B.M.Vranken seems to be more reluctant in that respect. See his case note in [2002] NJ, 240, no. 5.

have to make the distinction between the affection damage (the loss "merely" resulting from the death of the loved one) on the one hand and the loss resulting from the emotional shock on the other hand. The first one is not compensable, the second is. The question of course arises whether the judge can be expected to be capable of making this distinction. Van Dam refers to this as a mission impossible[66].

In sum, this decision of the *Hoge Raad* is an important milestone which opens the possibility to recover compensation for damage suffered as a result of an emotional shock, although it still formulates stringent conditions for this compensation. More particularly the requirement that as a result of this emotional shock the victim must have suffered a specific psychological damage (different to the affection damage) may in practice prove to constitute an important barrier. 28

In 2002 another decision of the *Hoge Raad* concerning non-pecuniary losses gave rise to many comments. It concerned the interesting question whether a victim who falls into a coma and is therefore not (fully) aware of his situation can claim compensation for non-pecuniary losses. In a case of 20 September 2002 the *Hoge Raad* had to deal with a situation where a victim was in a coma, subsequently (more or less) awoke and then died[67]. The *Hoge Raad* holds that in this particular case the victim has a right to compensation of non-pecuniary losses for the period that he suffered unconsciousness. The justification for this is not the pain or the suffering, but the simple fact that the victim lacked the possibility to enjoy his life during the period that he was unconscious. The literature holds that in this particular case the *Hoge Raad* apparently held it important that the victim awoke and therefore at least at one moment must have been aware of his unconsciousness. It is indeed probably hard to justify compensation of the non-pecuniary loss with the argument that someone lost the possibility to enjoy his life if he was never even aware of it[68]. 29

8. Statute of Limitations and Recourse

Issues of the statute of limitations and the rights of recourse seem border-line problems, but can be pretty important in practice. Above we already referred to a proposal introduced by the government concerning the statute of limitations for personal injury. There is, moreover, also some case law of the *Hoge Raad* concerning the question when the statute of limitations can be interrupted. It is generally held that the limitation period is interrupted when the creditor writes a clear and unambiguous request to the debtor to fulfil his obligations. The *Hoge Raad* holds that one has to look at the type of act by the creditor to interpret whether it is a sufficient enough warning to the debtor. This is more particularly important since it indicates to the debtor that even af- 30

[66] C.C. van Dam, [2002] VR, 207–208.
[67] *Hoge Raad* 20 September 2002, [2002] RvdW, 142.
[68] For a comment on this case see T. Hartlief, [2003] WPNR 6519/111 and see R.P.J.L. Tjittes, [2003] NTBR, 49 and following.

ter the statute of limitations has expired he should keep his records and evidence available[69]. The question therefore arises whether the letter or document from the creditor should reasonably have been interpreted in such a way by the debtor that the creditor clearly showed his intention to call on the performance of the obligations by the debtor[70]. Whether this is actually the case will also depend upon other circumstances, like for instance previous correspondence. In case law apparently the question especially arises whether in case of negotiations between parties one or more of the letters that were sent during the negotiation phase can be interpreted as a letter to interrupt the statute of limitations. It has been claimed that any letter during the negotiation phase would aim at the interruption of the limitation, but a recent decision of the *Hoge Raad* makes clear that also during negotiations the interruption of the statute of limitations has to be formulated in a clear and unambiguous manner[71].

31 Another *Hoge Raad* case deals with the question of what type of statute of limitations applies on recourse actions[72]. This is an important question for the legal practice concerning personal injury cases. In legal doctrine it has been held that recourse actions were in fact not claims in the sense of art. 3:310 of the Dutch Civil Code so that, in the absence of a specific rule, the general statute of limitations of art. 3:306 BW would apply[73]. The *Hoge Raad* however decided differently for a claim based on the VOA (*Verhaalswet Ongevallen Ambtenaren*)[74]. The *Hoge Raad* held that a right of recourse based on art. 2 of this VOA had to be qualified as a claim to remedy damage as meant in art. 3:310 of the Dutch Civil Code. The *Hoge Raad* points at the fact that a recourse may not have as effect that the injurer would be in a worse position than he would have been in if the victim had claimed compensation himself. The *Hoge Raad* therefore seems to limit the recourse based on this VOA. On the other hand the recourse, as regulated in the VOA, constitutes a rather general principle, so that one may assume that this applies for other recourse actions as well.

D. Doctrine

Introduction

32 It is of course not possible, within the scope of this brief contribution to the Yearbook, to discuss the overwhelming literature that was published in the area of tort law in the Netherlands in 2002. Tort and insurance are still heavily

[69] See *Hoge Raad* 25 January 2002, [2002] NJ, 169.
[70] See *Hoge Raad* 1 December 2000, [2001] NJ, 46.
[71] *Hoge Raad* 1 February 2002, [2002] NJ, 195; [2002] TVP, 65–68 with case note by Chr.H. van Dijk.
[72] *Hoge Raad* 31 May 2002, [2002] RvdW, 90.
[73] See for an overview of the literature in this respect A.J. Akkermans, [1998] TVP, 35–36.
[74] This is a statute that gives a right of recourse to the State for payments made to injured (or deceased) civil servants or their descendants.

debated in the Netherlands today and therefore give rise to a lot of literature. Many of the publications are reactions to recent cases or to legislative evolutions; we have therefore referred to that literature when discussing those.

Within the scope of this contribution we are not going to provide an overview of all articles published in law reviews to which we have not referred yet. Instead we would like to address some literature that does not directly deal with legislation or case law but nevertheless addresses important evolutions in the Netherlands. Moreover, we would like to briefly mention a few recent proceedings volumes, monographs, dissertations and inauguration addresses. They provide an interesting impression of the state of legal doctrine concerning tort law in the Netherlands. 33

Articles with Respect to a Few Other Relevant Evolutions

1. "No Cure, No Pay"

An important discussion arose in the Netherlands concerning the acceptability of contingency fee arrangements and more general "no cure, no pay" payment systems for attorneys. The Dutch bar had traditionally prohibited these arrangements, but this will now be changed as a result of a decision of the Dutch cartel authority (*Nederlandse Mededingings Autoriteit* NMA). The NMA holds that the prohibition for attorneys to work on a "no cure, no pay" basis limits competition since other providers of legal aid (who are not attorneys) have the possibility to work on a "no cure, no pay" basis. Moreover, the NMA held that this prohibition is bad for a good exercise of the profession by attorneys. This NMA decision and the subsequent reaction by the National Bar Association (*Nederlandse Orde van Advocaten*, NOVA) have been heavily discussed in the literature[75]. Both those in favour and those against "no cure, no pay" have provided arguments in the debate[76]. The debate concerning the acceptability of "no cure, no pay" is strongly related to the discussion concerning the existence of a so-called claim culture in tort law[77]. 34

2. Psychological Damage

Another issue which is somewhat related to case law, but not to case law from the period we discussed, is the precise scope of protection of the employer's liability of art. 7:658 of the Dutch Civil Code. Academics active in labour law have argued that the mental well-being of employees should also be protected under the scope of art. 7:658 of the Civil Code[78]. Some other literature, mostly from tort lawyers, has argued that emotional interests could not be protected 35

[75] See for instance [2002] NJB, 1335 and M.W. Guensberg, [2002] *Advocatenblad*, 591 and Meijer, [2002] *Advocatenblad*, 268–269.

[76] See for instance F.Th. Kremer, [2002] TVP, 1; L. Dommering-Van Rongen, [2002] AV&S, 61 and Van Dort/Schirmeister, [2002] TVP, 45.

[77] So it is argued by Hoogland, [2002] *Advocatenblad*, 204–209.

[78] So A.C.J.M. Geers, in: M. Faure/T. Hartlief (eds.), *Schade door arbeidsongevallen en nieuwe beroepsziekten* (2001), 19 and A.S.J. Vegter, [2001] AV&S, 133.

under the scope of art. 7:658, but maybe under the scope of art. 7:611 of the Civil Code[79]. This is clearly also related to the different scope of protection of art. 7:658 and 7:611 of the Civil Code, an issue we discussed above[80].

3. Again: Pain and Suffering

36 We extensively discussed the *Hoge Raad* case of 20 February 2002 accepting the possibility of obtaining recovery for an emotional shock, but rejecting compensation for so-called "affection damages". That *Hoge Raad* decision once more made clear that Dutch law needs a legislative intervention regulating the compensation for non-pecuniary losses. In the previous overview we discussed a bill that has been introduced in this respect[81]. A lot of literature deals on the one hand with reactions to the *Hoge Raad* case but others also discuss the legislative model that was advanced. The literature for instance argues that the most crucial issue in the compensation of non-pecuniary losses is probably the recognition of harm, not so much the compensation of damage[82]. Others have formulated severe criticisms of the legislative proposal to award € 10,000 to all survivors of a victim, irrespective of the type of family relationship. Only a very limited number of family members would be entitled to this limited amount of "affection damages". This has been criticised in many articles[83].

Handbooks

4. A.S. Hartkamp, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, Verbintenissenrecht, deel III, De verbintenis uit de wet* (Tjeenk Willink, Deventer 2002)

37 This is probably the most well-known handbook on tort law from the famous Asser series written by Procurate General of the *Hoge Raad* (and Professor at the University of Amsterdam), Arthur Hartkamp. In this new edition he was assisted by Carla Sieburgh, recently nominated Professor of Private Law at the Catholic University of Nijmegen.

[79] See in this respect already S.D. Lindenbergh, *Arbeidsongevallen en beroepsziektes* (2000), 41 and S.D. Lindenbergh, in: M. Faure/T. Hartlief (supra fn. 78), 169; T. Hartlief, WPNR 6471 (2001), 1068 and C.J.H. Jansen, in: *Yin-Yang (proceedings volume offered to Van Mourik)* (2000), 101.

[80] See no. 17.

[81] See M. Faure/T. Hartlief (supra fn.1), 356–358.

[82] See for instance the editorial by J. Van den Berg/S. Damminga, [2002] AA, 313.

[83] See for instance S.D. Lindenbergh, [2002] TVP, 62–64, W.H. van Boom, [2001] NJB, 1301–1302, W.H. van Boom, [2001] AV&R, 95, A.J. Verhey, [2001] NJB, 1568–1569 and J.B.M. Vranken, [2001] WPNR, 6460, 835

Proceedings Volumes

5. J.M. Barendrecht and Others, *Kring van aansprakelijken bij massaschade* (LSA bundel, Vermande, Lelystad 2002)

This volume contains the papers presented at the meeting of the Association of Personal Injury Lawyers (*Letselschadeadvocaten*) in the Netherlands. Among the many contributions is also an interesting paper by the Tilburg private law professor, Maurits Barendrecht[84]. Barendrecht addresses the developments in liability law and attempts to provide a framework to judge the future developments in liability law given the justified expectations and functions of tort law. 38

6. A.J. Akkermans/E. Brans (eds.), *Aansprakelijkheid en schadeverhaal bij rampen* (Ars Aequi Libri, Nijmegen 2002)

This volume contains many papers by some of the most well-known tort lawyers in the Netherlands and deals with liability and compensation in case of catastrophes. The role of tort law in case of catastrophes is addressed in many papers as well as public law solutions. The editors are Arno Akkermans (Professor of Private Law at the Free University of Amsterdam) and Edward Brans (formerly working at the Free University of Amsterdam as well and currently attorney at law in Rotterdam). 39

7. J. Spier/W.A.M. Van Schendel, *Schadevergoeding: een eeuw later* (Kluwer, Deventer 2002)

This volume contains papers offered to A.R. Bloembergen, former Vice President of the *Hoge Raad*. The contributors are academics and practitioners who worked with Auke Bloembergen and a variety of topics in tort law are dealt with. 40

Monographs

8. M. Faure/T. Hartlief, *Nieuwe risico's en vragen van aansprakelijkheid en verzekering* (Serie Recht en Praktijk, Kluwer, Deventer 2002)

In the Netherlands, a lot of interest has been given to new risks, especially those related to health risks. This book deals with the question how the law, more particularly tort law and its alternatives (insurance, compensation funds) should deal with the challenges posed by new risks. 41

9. S.D. Lindenbergh/A.R. Bloembergen, *Schadevergoeding: algemeen, deel 1, monografieën nieuw BW,* 234 (2nd edn, Kluwer, Deventer 2002)

This book by Leiden senior lecturer, Lindenbergh and former Vice President of the *Hoge Raad*, Bloembergen is the second edition of a well-known mono- 42

[84] It was equally published in [2002] NJB, 605–617.

graph on damages. It deals at the academic and practical level with all kinds of questions relating to the types of damages, estimation questions and remedies.

10. R.M.J.T. van Dort/R. Rensema, *Schadevergoeding* (Fiscale Monografieën 13, Kluwer, Deventer 2002)

43 This book fits into a general tendency in Dutch legal doctrine to give more attention to the issue of damages and remedies. A very important issue in legal practice is the way the tax authorities deal with damages which are awarded. All the different tax aspects of damages awards are addressed in this monograph, written by two practitioners.

11. J.M. Barendrecht/I. Giesen/M.H.M. Schellekens/M.W. Scheltema, *Overheidsaansprakelijkheid voor informatieverstrekking, Nederlands Recht, Rechtsvergelijking in de aansprakelijkheid van particuliere informatieverstrekkers* (Boom Juridische Uitgevers, Den Haag 2002)

44 This is a book from the well known Tilburg Center for Liability Law and deals with the duties of public authorities to provide information and the question under which conditions public authorities can be held liable for not providing information, providing wrongful information or otherwise committing torts (e.g. infringements on privacy) when providing information.

12. J.E. Heutink/G.E. Van Maanen/B.P.M. Van Ravel/B.J. Schueler, *Schadevergoeding bij rechtmatige overheidsdaad* (Den Haag 2002)

45 This book deals with compensation that may be due to victims of lawful acts by public authorities.

Dissertations

13. R. Nehmelman, *Het algemeen persoonlijkheidsrecht,* (Dissertation, Rijksuniversiteit Utrecht, Kluwer, Deventer 2002)

46 In this doctoral research, Nehmelman claims that a general personality right can provide protection for those aspects that are inherently connected to the right on personality. This concerns for instance the information concerning one's descent. Moreover, the dissertation also holds that it might be possible to provide another way of introducing fundamental human rights into Dutch Civil Law by applying a general right to personality.

14. A.J. Verheij, *Vergoeding van immateriële schade bij aantasting van de persoon,* (Dissertation, Free University of Amsterdam, Ars Aequi Libri, Nijmegen 2002)

47 After the dissertation of Lindenberg in Leiden in 1998 concerning non-pecuniary losses, this is the second major dissertation dealing with the compensation of non-pecuniary losses for violations of personality. Verheij deals with defamation and privacy, nervous shock and all other aspects of so-called psy-

chiatric injuries. He addresses in detail the functions of compensation of non-pecuniary losses as well as the function of a vindication of rights.

15. E.H.P. Brans, *Liability for Damage to Public Natural Resources, Standing, Damage and Damage Assessment*, (Dissertation, Erasmus University of Rotterdam, Deventer 2001)

In this dissertation Edward Brans provides an overview of legal remedies against damage to natural resources. The dissertation provides an overview of Dutch and American law in this respect as well as of evolutions at the European level. More particularly a lot of attention is given to the White Paper on Environmental Liability. International civil liability for damage to natural resources is also extensively discussed in this dissertation. 48

16. E.J.A.M. Van den Akker, *Beroepsaansprakelijkheid ten opzichte van derden,* (Dissertation Catholic University of Brabant, Den Haag 2001)

This dissertation concerns elaborate comparative legal research concerning the duties of care of attorneys, accountants and notaries towards third parties, being others than the one with whom the professional concluded a contract. 49

Inauguration Addresses

17. A. Van Rossum, *Falend toezicht. De aansprakelijkheid van de economische en financiële toezichthouder* (2001) Inauguration Address Rijksuniversiteit Utrecht, Den Haag

This is the text of the inauguration lecture of Professor Van Rossum. It deals with the liability of controlling and monitoring authorities in the economic and financial area. The liability issues addressed in this inauguration lecture more particularly deal with failures of control. 50

18. J. Spier, *Rampscenario's* (2002), Inauguration Address Maastricht University, Deventer

In this Maastricht inauguration address Advocate General Jaap Spier addresses the consequences of the disaster of 11 September 2001 for the system of liability and insurance. He argues that 11 September has called for a fundamental need for a rethinking of liability law and may lead to such expansions of tort law that insurability is fundamentally endangered unless serious changes take place. 51

19. A.J. Akkermans, *De "omkeringsregel" bij het bewijs van causaal verband* (2002), Inauguration Address Free University of Amsterdam, Den Haag

This is the rewritten text of the inauguration address Professor Arno Akkermans held on 15 October 2001 when accepting the chair of private law at the Free University of Amsterdam. He rewrote his lecture into a 180 page book 52

published in 2002. It deals with uncertainty over causation and more particularly the case law of the *Hoge Raad* concerning the reversal of the burden of proving causation (the so-called reversal rule), which was also discussed above[85].

E. Concluding Remarks

53 Tort law and insurance is still in full evolution in the Netherlands. Although at the legislative level not that much happened in 2002 as a result of many political crises, still many governmental and other committees were active, among others to address important questions like the way tort law should deal with emerging new risks. Moreover, the case law of the *Hoge Raad* is, as was the case last year, still in full evolution. Some areas, like medical liability and traffic liability showed a relatively quiet picture (at least as far as the *Hoge Raad* is concerned), but areas like the liability for non-subordinates and employer's liability always give rise to more case law. The tendency always seems to be towards an ever expanding liability (more particularly of employers).

54 This obviously leads to many calls of critical scholars asking on the one hand whether there is still any system in the framework of tort law as developed by the *Hoge Raad*. The case by case approach, for instance with respect to the liability for non-subordinates, leads to very refined, but sometimes hard to understand, distinctions. Others point at the fact that, e.g. in the area of employer's liability, one can wonder whether there is still any scope at all for the employer to escape liability. This expansion of liability undoubtedly leads to pressures on the insurance market which again leads authors to question the usefulness of tort law as a system of compensation. Within the next years, and at least during the next government period, it can be expected that more particularly the relationship between the compensatory functions of social security and tort law could be drastically changed. There is still a lot more to come.

55 That is definitely also the case as far as the area of damages and remedies is concerned. The proposal for a new law concerning non-pecuniary losses was only introduced in parliament in February 2003, but important news came in this respect from the *Hoge Raad*. The case law concerning emotional shock on the one hand provided an opening to award compensation for the loss suffered as a result of dramatic emotional shocks, but on the other hand the *Hoge Raad* still repeated that within the current legislative system, affection damages cannot be compensated under Dutch law. That was and still is, according to the *Hoge Raad*, the task of the legislator. Also in this field there is therefore still more to be expected in the coming years.

[85] See supra fn. 18.